

1 TODD KIM, Assistant Attorney General
2 Environment & Natural Resources Division
3 ROMNEY S. PHILPOTT, Senior Attorney
4 Colo. Bar No. 35112
5 United States Department of Justice
6 Environment and Natural Resources Division
7 Natural Resources Section
8 999 18th Street, South Terrace – Suite 370
9 Denver, CO 80202
10 (303) 844-1810
11 romney.philpott@usdoj.gov

12 *Attorneys for Defendants*

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
339
340
341
342
343
344
345
346
347
348
349
349
350
351
352
353
354
355
356
357
358
359
359
360
361
362
363
364
365
366
367
368
369
369
370
371
372
373
374
375
376
377
378
379
379
380
381
382
383
384
385
386
387
388
389
389
390
391
392
393
394
395
396
397
398
399
399
400
401
402
403
404
405
406
407
408
409
409
410
411
412
413
414
415
416
417
418
419
419
420
421
422
423
424
425
426
427
428
429
429
430
431
432
433
434
435
436
437
438
439
439
440
441
442
443
444
445
446
447
448
449
449
450
451
452
453
454
455
456
457
458
459
459
460
461
462
463
464
465
466
467
468
469
469
470
471
472
473
474
475
476
477
478
479
479
480
481
482
483
484
485
486
487
488
489
489
490
491
492
493
494
495
496
497
498
499
499
500
501
502
503
504
505
506
507
508
509
509
510
511
512
513
514
515
516
517
518
519
519
520
521
522
523
524
525
526
527
528
529
529
530
531
532
533
534
535
536
537
538
539
539
540
541
542
543
544
545
546
547
548
549
549
550
551
552
553
554
555
556
557
558
559
559
560
561
562
563
564
565
566
567
568
569
569
570
571
572
573
574
575
576
577
578
579
579
580
581
582
583
584
585
586
587
588
589
589
590
591
592
593
594
595
596
597
598
599
599
600
601
602
603
604
605
606
607
608
609
609
610
611
612
613
614
615
616
617
618
619
619
620
621
622
623
624
625
626
627
628
629
629
630
631
632
633
634
635
636
637
638
639
639
640
641
642
643
644
645
646
647
648
649
649
650
651
652
653
654
655
656
657
658
659
659
660
661
662
663
664
665
666
667
668
669
669
670
671
672
673
674
675
676
677
678
679
679
680
681
682
683
684
685
686
687
688
689
689
690
691
692
693
694
695
696
697
698
698
699
699
700
701
702
703
704
705
706
707
708
709
709
710
711
712
713
714
715
716
717
718
719
719
720
721
722
723
724
725
726
727
728
729
729
730
731
732
733
734
735
736
737
738
739
739
740
741
742
743
744
745
746
747
748
749
749
750
751
752
753
754
755
756
757
758
759
759
760
761
762
763
764
765
766
767
768
769
769
770
771
772
773
774
775
776
777
778
779
779
780
781
782
783
784
785
786
787
788
789
789
790
791
792
793
794
795
796
797
798
798
799
799
800
801
802
803
804
805
806
807
808
809
809
810
811
812
813
814
815
816
817
818
819
819
820
821
822
823
824
825
826
827
828
829
829
830
831
832
833
834
835
836
837
838
839
839
840
841
842
843
844
845
846
847
848
849
849
850
851
852
853
854
855
856
857
858
859
859
860
861
862
863
864
865
866
867
868
869
869
870
871
872
873
874
875
876
877
878
879
879
880
881
882
883
884
885
886
887
888
889
889
890
891
892
893
894
895
896
897
898
898
899
899
900
901
902
903
904
905
906
907
908
909
909
910
911
912
913
914
915
916
917
918
919
919
920
921
922
923
924
925
926
927
928
929
929
930
931
932
933
934
935
936
937
938
939
939
940
941
942
943
944
945
946
947
948
949
949
950
951
952
953
954
955
956
957
958
959
959
960
961
962
963
964
965
966
967
968
969
969
970
971
972
973
974
975
976
977
978
979
979
980
981
982
983
984
985
986
987
988
989
989
990
991
992
993
994
995
996
997
998
999
1000
1001
1002
1003
1004
1005
1006
1007
1008
1009
1009
1010
1011
1012
1013
1014
1015
1016
1017
1018
1019
1019
1020
1021
1022
1023
1024
1025
1026
1027
1028
1029
1029
1030
1031
1032
1033
1034
1035
1036
1037
1038
1039
1039
1040
1041
1042
1043
1044
1045
1046
1047
1048
1049
1049
1050
1051
1052
1053
1054
1055
1056
1057
1058
1059
1059
1060
1061
1062
1063
1064
1065
1066
1067
1068
1069
1069
1070
1071
1072
1073
1074
1075
1076
1077
1078
1079
1079
1080
1081
1082
1083
1084
1085
1086
1087
1088
1089
1089
1090
1091
1092
1093
1094
1095
1096
1097
1098
1098
1099
1099
1100
1101
1102
1103
1104
1105
1106
1107
1108
1109
1109
1110
1111
1112
1113
1114
1115
1116
1117
1118
1119
1119
1120
1121
1122
1123
1124
1125
1126
1127
1128
1129
1129
1130
1131
1132
1133
1134
1135
1136
1137
1138
1139
1139
1140
1141
1142
1143
1144
1145
1146
1147
1148
1149
1149
1150
1151
1152
1153
1154
1155
1156
1157
1158
1159
1159
1160
1161
1162
1163
1164
1165
1166
1167
1168
1169
1169
1170
1171
1172
1173
1174
1175
1176
1177
1178
1179
1179
1180
1181
1182
1183
1184
1185
1186
1187
1188
1189
1189
1190
1191
1192
1193
1194
1195
1196
1197
1198
1198
1199
1199
1200
1201
1202
1203
1204
1205
1206
1207
1208
1209
1209
1210
1211
1212
1213
1214
1215
1216
1217
1218
1219
1219
1220
1221
1222
1223
1224
1225
1226
1227
1228
1229
1229
1230
1231
1232
1233
1234
1235
1236
1237
1238
1239
1239
1240
1241
1242
1243
1244
1245
1246
1247
1248
1249
1249
1250
1251
1252
1253
1254
1255
1256
1257
1258
1259
1259
1260
1261
1262
1263
1264
1265
1266
1267
1268
1269
1269
1270
1271
1272
1273
1274
1275
1276
1277
1278
1279
1279
1280
1281
1282
1283
1284
1285
1286
1287
1288
1289
1289
1290
1291
1292
1293
1294
1295
1296
1297
1298
1298
1299
1299
1300
1301
1302
1303
1304
1305
1306
1307
1308
1309
1309
1310
1311
1312
1313
1314
1315
1316
1317
1318
1319
1319
1320
1321
1322
1323
1324
1325
1326
1327
1328
1329
1329
1330
1331
1332
1333
1334
1335
1336
1337
1338
1339
1339
1340
1341
1342
1343
1344
1345
1346
1347
1348
1349
1349
1350
1351
1352
1353
1354
1355
1356
1357
1358
1359
1359
1360
1361
1362
1363
1364
1365
1366
1367
1368
1369
1369
1370
1371
1372
1373
1374
1375
1376
1377
1378
1379
1379
1380
1381
1382
1383
1384
1385
1386
1387
1388
1389
1389
1390
1391
1392
1393
1394
1395
1396
1397
1398
1398
1399
1399
1400
1401
1402
1403
1404
1405
1406
1407
1408
1409
1409
1410
1411
1412
1413
1414
1415
1416
1417
1418
1419
1419
1420
1421
1422
1423
1424
1425
1426
1427
1428
1429
1429
1430
1431
1432
1433
1434
1435
1436
1437
1438
1439
1439
1440
1441
1442
1443
1444
1445
1446
1447
1448
1449
1449
1450
1451
1452
1453
1454
1455
1456
1457
1458
1459
1459
1460
1461
1462
1463
1464
1465
1466
1467
1468
1469
1469
1470
1471
1472
1473
1474
1475
1476
1477
1478
1479
1479
1480
1481
1482
1483
1484
1485
1486
1487
1488
1489
1489
1490
1491
1492
1493
1494
1495
1496
1497
1498
1498
1499
1499
1500
1501
1502
1503
1504
1505
1506
1507
1508
1509
1509
1510
1511
1512
1513
1514
1515
1516
1517
1518
1519
1519
1520
1521
1522
1523
1524
1525
1526
1527
1528
1529
1529
1530
1531
1532
1533
1534
1535
1536
1537
1538
1539
1539
1540
1541
1542
1543
1544
1545
1546
1547
1548
1549
1549
1550
1551
1552
1553
1554
1555
1556
1557
1558
1559
1559
1560
1561
1562
1563
1564
1565
1566
1567
1568
1569
1569
1570
1571
1572
1573
1574
1575
1576
1577
1578
1579
1579
1580
1581
1582
1583
1584
1585
1586
1587
1588
1589
1589
1590
1591
1592
1593
1594
1595
1596
1597
1598
1598
1599
1599
1600
1601
1602
1603
1604
1605
1606
1607
1608
1609
1609
1610
1611
1612
1613
1614
1615
1616
1617
1618
1619
1619
1620
1621
1622
1623
1624
1625
1626
1627
1628
1629
1629
1630
1631
1632
1633
1634
1635
1636
1637
1638
1639
1639
1640
1641
1642
1643
1644
1645
1646
1647
1648
1649
1649
1650
1651
1652
1653
1654
1655
1656
1657
1658
1659
1659
1660
1661
1662
1663
1664
1665
1666
1667
1668
1669
1669
1670
1671
1672
1673
1674
1675
1676
1677
1678
1679
1679
1680
1681
1682
1683
1684
1685
1686
1687
1688
1689
1689
1690
1691
1692
1693
1694
1695
1696
1697
1698
1698
1699
1699
1700
1701
1702
1703
1704
1705
1706
1707
1708
1709
1709
1710
1711
1712
1713
1714
1715
1716
1717
1718
1719
1719
1720
1721
1722
1723
1724
1725
1726
1727
1728
1729
1729
1730
1731
1732
1733
1734
1735
1736
1737
1738
1739
1739
1740
1741
1742
1743
1744
1745
1746
1747
1748
1749
1749
1750
1751
1752
1753
1754
1755
1756
1757
1758
1759
1759
1760
1761
1762
1763
1764
1765
1766
1767
1768
1769
1769
1770
1771
1772
1773
1774
1775
1776
1777
1778
1779
1779
1780
1781
1782
1783
1784
1785
1786
1787
1788
1789
1789
1790
1791
1792
1793
1794
1795
1796
1797
1798
1798
1799
1799
1800
1801
1802
1803
1804
1805
1806
1807
1808
1809
1809
1810
1811
1812
1813
1814
1815
1816
1817
1818
1819
1819
1820
1821
1822
1823
1824
1825
1826
1827
1828
1829
1829
1830
1831
1832
1833
1834
1835
1836
1837
1838
1839
1839
1840
1841
1842
1843
1844
1845
1846
1847
1848
1849
1849
1850
1851
1852
1853
1854
1855
1856
1857
1858
1859
1859
1860
1861
1862
1863
1864
1865
1866
1867
1868
1869
1869
1870
1871
1872
1873
1874
1875
1876
1877
1878
1879
1879
1880
1881
1882<br

The U.S. Bureau of Reclamation (“Reclamation”); M. Camille Calimlim Touton, Commissioner of Reclamation; and Jacklynn L. Gould, Regional Director, Interior Region 8, Lower Colorado Basin, Reclamation (collectively “Defendants”), provide this supplemental brief as required by the Court’s February 21 and February 26, 2024 Orders (ECF Nos. 78, 79, and 81).

INTRODUCTION

In its February 21, 2024 Order, the Court ruled that Defendants violated the National Environmental Policy Act (“NEPA”) because Reclamation incorrectly issued a Finding of No Significant Impact (“FONSI”) for a partial assignment and transfer (“Transfer”) of an Arizona fourth priority Colorado River water entitlement held by GSC Farm, LLC (“GSC Farm”) to the Town of Queen Creek (“Queen Creek”). Feb. 21, 2024 Order (“MSJ Order”), ECF No. 78. The Court ordered the parties to provide supplemental remedy briefs “addressing how to proceed given that the . . . Transfer is underway.” Feb. 26, 2024 Order, ECF No. 81. Defendants make two arguments in response to this question.

First, a key factor underlying how matters should proceed is the nature of the remand to Reclamation. In its MSJ Order, the Court stated it was “setting aside the [FONSI] and remanding to the Bureau of Reclamation for preparation of an environmental impact statement [“EIS”] under NEPA consistent with this decision.” MSJ Order 30. However, the parties have not yet briefed the proper remedy for the Court’s merits ruling, and therefore the Court issued its order without the benefit of the parties’ positions. Under the circumstances in this case, Defendants believe that it is appropriate under Ninth Circuit caselaw for the Court to allow Reclamation to consider whether an EIS, or in the alternative, a supplemental environmental assessment (“EA”) addressing the two specific defects found by the Court, is necessary to ensure compliance with NEPA. There are substantial differences between the two NEPA documents. NEPA and its implementing regulations govern the content and process for an EIS—and any EIS on remand would require a multi-year process entailing review of a variety of resources and issues—the vast majority of which were not raised in this litigation or for which the Court did not find

1 Reclamation's analysis wanting. On the other hand, a supplemental EA addressing the
2 specific defects found by the Court could be completed in substantially less time and with
3 less of a burden on the private parties to the Transfer and Reclamation. Under these
4 circumstances, it is appropriate for the Court to allow Reclamation, in the first instance, to
5 determine whether to prepare an EIS or supplemental EA on remand.

6 Second, Defendants maintain that Reclamation's FONSI and approval of the
7 Transfer and execution of the contract documents for the Transfer should not be vacated
8 during the remand. Defendants believe that the defects found by the Court are readily
9 correctible and further do not indicate that Reclamation's overall determination—that the
10 Transfer *itself* would not have significant impacts on the environment—was arbitrary or
11 capricious. Further, vacatur of the Transfer and related contract documents would be very
12 disruptive—particularly to third parties Queen Creek and GSC Farm. In contrast, Plaintiffs
13 will suffer no harm if water deliveries to Queen Creek are continued during the remand.
14 As such, Reclamation's decision to approve the Transfer and execution of the related
15 documents should remain in place pending additional NEPA analysis.¹

16 **BACKGROUND**

17 **I. The Transfer**

18 Reclamation can only deliver an Arizona fourth priority Colorado River entitlement,
19 such as that at issue here, if there is a “valid” contract between the user and the United
20 States. *Arizona v. California*, 547 U.S. 150, 156 (2006). Prior to approval of the Transfer
21 in this case, GSC Farm was party to such a contract, entitling it to divert up to 2,913.3 acre
22

23 ¹ Defendants believe that these arguments are properly within the context of the briefing
24 required by the Court, particularly as the parties have not previously briefed the
25 appropriate remedy given the Court's merits ruling. However, to the extent the Court
26 construes Defendants' arguments as requests for partial reconsideration, Defendants
27 believe that the requests are authorized under Rule 54(b) of the Federal Rules of Civil
28 Procedure. Further, to the extent Plaintiffs argue that Defendants should have made their
arguments in a motion for reconsideration within 14 days of the MSJ Order consistent
with LRCiv. 7.2(g), Defendants maintain that good cause for the timing of this request
exists given Defendants' belief that such issues were to be addressed in the supplemental
briefing ordered by the Court contemporaneously with its MSJ Order (the deadlines for
which were extended at Plaintiffs' request).

1 feet per year (“AFY”) for irrigation of its lands. ECF No. 63-1 at 6644, 6651-52.² GSC
2 Farm and Queen Creek proposed a partial transfer of GSC Farm’s entitlement to Queen
3 Creek, and after the Arizona Department of Water Resources evaluated and recommended
4 the assignment and transfer be approved, Reclamation initiated a review under NEPA to
5 evaluate the potential environmental impacts from the Transfer. The formal EA process
6 commenced in August 2021 with Reclamation’s seeking public input during scoping,
7 followed by preparation of a draft EA, accepting public comments on the draft EA, and
8 then issuance of its final EA. *Id.* at 6647-50.

9 In its EA, Reclamation described the affected environment—and the potential
10 consequences to the affected environment—from the proposed transfer and from two
11 alternatives. *Id.* at 6657-90. The EA provided concise explanations as to why no significant
12 impacts were expected with respect to air quality, Global Climate Change, groundwater,
13 public health and safety, land use, visual resources, cultural and human resources, Indian
14 trust assets, recreation, surface water quantity and quality, hydroelectric power, and
15 vegetation/invasive species. *Id.* at 6649-50, 6659-63. It then focused on four key issues that
16 Reclamation determined, informed by public comment during scoping, warranted detailed
17 analysis: biological resources; socioeconomic concerns; prime farmlands; and
18 environmental justice. *Id.* at 6649. It provided detailed analysis of these four issues, and
19 explained why the Transfer would have no significant impacts with respect to them.
20 Finally, the EA discussed the potential cumulative effects of the Proposed Action: it
21 identified 18 separate past, present or reasonably foreseeable actions or issues to be
22 addressed in the cumulative impacts analysis, and explained why the Transfer would not
23 result in any cumulatively significant impacts. *Id.* at 6680-87.

24 Following issuance of the EA, Reclamation prepared a FONSI, which summarized
25 the EA’s findings, and determined that “the Proposed Action will not have a significant
26 effect on the human environment” and, therefore, an EIS was not required. ECF No. 65-1,

28 ² Consistent with the summary judgment briefing, administrative record page numbers
29 are used for documents from the administrative record.

1 Ex. J, at 6736-38. Reclamation issued its FONSI in August 2022, approximately one year
2 after commencing the NEPA process. *Id.*

3 **II. Case Proceedings**

4 On January 3, 2023, Plaintiffs filed their complaint challenging Reclamation’s EA
5 and FONSI, and shortly thereafter filed an application for preliminary injunction. ECF Nos.
6 1 & 9. The Court, after holding a hearing on March 8, 2023, denied the application. April
7 6, 2023 Order 30, ECF No. 49 (“PI Order”). The Court held that Plaintiffs had not
8 demonstrated a likelihood of success on the merits, nor that an injunction was necessary to
9 prevent irreparable harm. In particular, the Court noted that:

10 Plaintiffs have not explained how the diversion of 2,033 AFY along an
11 eighty-eight mile stretch of the Colorado River will worsen the current
12 drought when this water is already being taken out of the River for
13 agricultural use, especially when considering that this eighty-eight mile
stretch will only experience additional monthly average reductions in flows
of approximately 0.045 to 0.053 percent.

14 *Id.* at 27 (citing ECF No. 1-3 at 33). The Court further found that “there is no support in
15 the record for Plaintiffs’ assertion that the Proposed Water Transfer would significantly
16 impact the economy of the Colorado River Communities.” *Id.* Finally, it found that the
17 “[t]he same 2,033 AFY [that was the subject of the transfer] will be consumptively used
18 each year regardless of whether an injunction issues. It does not injure Plaintiffs if, during
19 the pendency of the dispute, the water is stored and used by Queen Creek instead of being
20 consumed to farm alfalfa or cotton by GSC Farm.” *Id.* (quoting ECF No. 27 at 26).

21 After the Court denied the application for a preliminary injunction, on April 28,
22 2023, Reclamation (and GSC Farm and Queen Creek, respectively) executed the contracts
23 to implement the Transfer, namely:

- 24 1. A partial assignment and transfer of GSC Farm’s Entitlement to Queen Creek;
- 25 2. A Colorado River water delivery contract between the United States and
Queen Creek providing for the delivery of up to 2,033.01 AFY at the Mark
Wilmer Pumping Plan on behalf of Queen Creek;
- 26 3. An amendment of the existing Colorado River water delivery contract between
GSC Farm and the United States to reduce GSC Farm’s Entitlement to 69.93
AFY (50 AFY for consumptive use), and
- 27 4. a Reclamation Wheeling Contract with Queen Creek to wheel the Entitlement

1 to Queen Creek through the Central Arizona Project (“CAP”) system.
2 Copies of these documents (hereinafter referred to as the “Transfer Contracts”) are attached
3 hereto as Exhibits A-C.³ Subsequently, in calendar year 2023, Queen Creek ordered and
4 took delivery of 2,033 AF of water. Declaration of Jacklynn L. Gould (“Gould Decl.”),
5 attached hereto as Ex. D, ¶ 18 & Ex. 1 thereto. For calendar year 2024, Queen Creek has
6 ordered full delivery of the 2,033 AF, and on December 28, 2023, Reclamation approved
7 the order. Gould Decl. ¶ 19 & Ex. 2 thereto.⁴

8 In the meantime, this case progressed to briefing of the parties’ cross-motions for
9 summary judgment. On February 21, the Court ruled on the motions in its MSJ Order. In
10 that order, the Court rejected many of Plaintiffs’ arguments that Reclamation’s analysis
11 was inadequate. First, with respect to the “intensity” factors under former 40 C.F.R. §
12 1508.27(b), the Court held that Reclamation had adequately addressed whether the
13 Transfer was highly controversial, because Plaintiffs did not identify “any substantial
14 dispute as to the ‘size, nature, or effect’ of the Water Transfer[.]” MSJ Order 25 (quoting
15 *WildEarth Guardians v. Provencio*, 923 F.3d 655, 673 (9th Cir. 2019)). Next, the Court
16 held that Plaintiffs had not identified any alleged effect on the human environment that was
17 “highly uncertain” or which presented an “unknown risk” under 40 C.F.R. § 1508.27 (b)(5)
18 because they only argued that “the data around the effects of the ongoing drought
19 affect[ing] the environment of the Colorado River are unknown.” *Id.* at 28. Further, the
20 Court expressly found that Reclamation “did consider the effects of the ongoing drought.”
21 *Id.* Moving to the general adequacy of the EA, the Court found that “if Reclamation was
22 required to consider the cumulative impacts of climate change and the ongoing
23 megadrought, Reclamation analyzed these factors in the EA to the extent that they were
24 applicable to the Water Transfer.” *Id.* at 26. Further, the Court found that Reclamation
25 “reasonably relied upon the 2004 [Lower Colorado River Multispecies Conservation Plan

26 ³ The Wheeling Contract is included as an attachment to the water delivery contract.

27 ⁴ Under Queen Creek’s delivery contract, Queen Creek must provide Reclamation with
28 its water order for the upcoming calendar year by October 1. Ex. B ¶ 7.1. Reclamation
has already received and approved Queen Creek’s order for 2024. Gould Decl. Ex. 2.

1 (“LCR MSCP”)] in concluding that the Water Transfer would ‘not result in a reduction in
2 the volume of flows below the Parker Dam beyond what was contemplated and is covered
3 by the LCR MSCP.” *Id.* at 29 (quoting ECF No. 63-1 at 6688).

4 However, the Court also held that Reclamation’s analysis of two of the 40 C.F.R. §
5 1508.27(b) intensity factors was inadequate. Specifically, the Court held that Reclamation
6 did not adequately address “the degree of which the action may establish a precedent”
7 under 40 C.F.R. § 1508.27(b)(6), because it did not provide “some explanation as to the
8 scope or size of the potential precedential effect” of the Transfer. MSJ Order 19. Further,
9 the Court found that Reclamation did not adequately analyze the extent to which the
10 Transfer “is related to other actions with individually insignificant but cumulatively
11 significant impacts” under 40 C.F.R. § 1508.27(b)(7). Specifically, in light of information
12 in the record that Reclamation had not specifically analyzed in the EA, the Court held that
13 it was “reasonably foreseeable that Queen Creek may try to acquire additional surface
14 water to fulfill its needs.” MSJ Order 23. The Court held that Reclamation should have
15 “factored this information into its analysis rather than concluding the growth and impact
16 are too speculative.” *Id.* As a result, the Court set aside Reclamation’s FONSI and
17 remanded to Reclamation for preparing of an EIS. *Id.* at 30. However, the Court further
18 stayed the Order and action pending supplemental briefing and a status conference
19 addressing “how to proceed because the Water Transfer is underway.” *Id.*

20 **ARGUMENT**

21 **I. The Court Should Allow Reclamation to Prepare a Supplemental EA on
Remand**

22 The Court did not find that Reclamation erred in determining that the Transfer *itself*
23 would *not* have significant impacts to the environment. Instead, the Court determined that
24 Reclamation inadequately addressed potential impacts arising from different, future
25 actions. As a result, there is a reasonable possibility that Reclamation could cure the defects
26 found by the Court by conducting an analysis on these issues in a supplemental EA. The
27 Court therefore should remand to Reclamation to prepare either an EIS *or* a supplemental
28 EA for further evaluation of the Transfer consistent with the Court’s opinion.

1 The Ninth Circuit has made it clear that “preparation of an EIS is not mandated in
2 all cases simply because an agency has prepared a deficient EA or otherwise failed to
3 comply with NEPA.” *Ctr. for Biological Diversity v. Nat'l Highway Traffic Admin.*,
4 538 F.3d 1172, 1225 (9th Cir. 2008). For instance, if “there is uncertainty over whether the
5 proposed project may have a significant impact, including uncertainty caused by an
6 incomplete administrative record or an inadequate EA, the court should ordinarily remand
7 for the agency to either prepare a supplemental EA or reconsider whether an EIS is
8 required.” *Id* at 1226 (citing *Metcalf v. Daley*, 214 F.3d 1135, 1146 (9th Cir. 2000)). *See*
9 *also O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 239 (5th Cir. 2007) (holding
10 that if the court finds “that the EA is inadequate in a manner that precludes making the
11 determination whether the project may have a significant impact, the court should remand
12 the case to the agency to correct the deficiencies in its analysis”) (internal citation and
13 quotation omitted) (cited in *Ctr. for Biological Diversity*, 538 F.3d at 1226). Indeed, this is
14 true even where there are “significant flaws in the EA [that] undermine [an agency’s]
15 conclusion that the proposed action would have no significant effect on the environment.
16 *Neighbors of the Mogollon Rim, Inc. v. U.S. Forest Serv.*, No. 22-15259, 2023 WL
17 3267846, at *3 (9th Cir. May 5, 2023) (holding that because the “seriously inadequate EA
18 [at issue] creates significant uncertainty, we cannot ‘categorically decide’ that the agency
19 could not support its conclusions in a revised EA”). By contrast, “if the court determines
20 that the agency's proffered reasons for its FONSI are arbitrary and capricious and the
21 evidence in a complete administrative record demonstrates that the project or regulation
22 may have a significant impact, then it is appropriate to remand with instructions to prepare
23 an EIS.” *Ctr. for Biological Diversity*, 538 F.3d at 1225.

24 As discussed above, the Court made no finding that Reclamation arbitrarily or
25 capriciously determined that the Transfer *itself* may result in significant impacts to the
26 environment. Rather, the defects found by the Court were the failure to undertake analyses
27 related to other, future actions or decisions. First, the Court found that Reclamation did not
28 analyze the degree to which the Transfer may establish precedent for future transfers—

1 specifically that Reclamation did not provide “some explanation as to the scope or size of
2 the potential precedential effect” of the Transfer. MSJ Order 19. Similarly, with respect to
3 cumulative impacts, the Court found that Reclamation should have projected that Queen
4 Creek, in the future, “may try to acquire additional surface water to fulfill its needs,” and
5 should have “factored this information into its analysis rather than concluding the growth
6 and impact are too speculative.” *Id.* at 23.

7 Neither of these analytic gaps found by the Court bring into question Reclamation’s
8 analysis that the Transfer itself would not have any significant impact on the environment.
9 In fact, during the merits briefing, Plaintiffs did not even argue—and the Court did not
10 find—that Reclamation’s analysis of the potential impacts of the Transfer itself was
11 inaccurate. Furthermore, the Court agreed with Defendants that Plaintiffs did not identify
12 “any substantial dispute as to the ‘size, nature, or effect’ of the Water Transfer.” *Id.* at 25
13 (quoting *WildEarth Guardians*, 923 F.3d at 673). *See also id.* at 26 (rejecting Plaintiffs’
14 argument that the Transfer had highly uncertain or unknown risks related to the drought,
15 and finding that Reclamation “did consider the effects of the ongoing drought”).

16 Because the Court made no findings questioning Reclamation’s determination that
17 the Transfer itself would not result in significant impacts, it is appropriate to allow
18 Reclamation the option of reconsidering whether an EIS is necessary after undertaking the
19 missing analyses. *See Ctr. for Biological Diversity*, 538 F.3d at 1226 (finding it
20 “questionable” that the agency could “on remand, prepare an EA that takes proper account
21 of this evidence and still conclude that the [action] has no significant environmental
22 impact” but nonetheless giving the agency the benefit of the doubt and declining “to order
23 the immediate preparation of an EIS”). *See also Neighbors of the Mogollon Rim*, 2023 WL
24 3267846, at *3 (despite finding “significant flaws” in the EA, holding that “[a] full EIS
25 may be necessary, but we leave that decision for the agency to consider in the first instance
26 on remand”); *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1054 (9th Cir. 2013)
27 (remanding to the district court “to enter an appropriate order requiring BLM to remedy
28 the deficiencies in the EA . . . or to prepare a more detailed EIS, whichever is considered

1 appropriate"); *All. for the Wild Rockies v. Gassmann Am. Forest Res. Council*, No. CV 21-
2 105, 2023 WL 4172930, at *32 (D. Mont. June 26, 2023) (concluding that "Plaintiff has
3 raised substantial questions about whether the Project will have a significant environmental
4 effect under 40 C.F.R. § 1508.27(b)(7), (9), and (10)," but nonetheless remanding "without
5 the instruction to prepare an EIS and instead allow[ing] the agencies to follow their
6 ordinary processes to determine whether an EIS is required").

7 Practical considerations in this case corroborate the reasonableness of allowing
8 Reclamation to determine whether the defects found by the Court might be addressed in a
9 supplemental EA, or whether an EIS is required. The required content of an EIS is governed
10 by NEPA and the Council for Environmentally Quality ("CEQ") implementing
11 regulations. Therefore, an EIS on remand would not be limited to the specific issues
12 identified by the Court—but rather will necessarily address a broad scope of resources and
13 issues that were never challenged by the Plaintiffs (or found inadequately addressed by the
14 Court). For instance, under the current version of the CEQ regulations, an EIS must address
15 in its environmental consequences section:

- 16 (1) The environmental impacts of the proposed action and reasonable
17 alternatives to the proposed action and the significance of those impacts.
18 The comparison of the proposed action and reasonable alternatives shall be
19 based on this discussion of the impacts.
- 20 (2) Any adverse environmental effects that cannot be avoided should the
21 proposal be implemented.
- 22 (3) The relationship between short-term uses of man's environment and the
23 maintenance and enhancement of long-term productivity.
- 24 (4) Any irreversible or irretrievable commitments of resources that would
25 be involved in the proposal should it be implemented.
- 26 (5) Possible conflicts between the proposed action and the objectives of
27 Federal, regional, State, Tribal, and local land use plans, policies and
28 controls for the area concerned. (§ 1506.2(d) of this chapter)
- (6) Energy requirements and conservation potential of various alternatives
and mitigation measures.
- (7) Natural or depletable resource requirements and conservation potential
of various alternatives and mitigation measures.
- (8) Urban quality, historic and cultural resources, and the design of the built
environment, including the reuse and conservation potential of various
alternatives and mitigation measures.
- (9) Means to mitigate adverse environmental impacts (if not fully covered

1 under § 1502.14(e)).

2 (10) Where applicable, economic and technical considerations, including
3 the economic benefits of the proposed action.

4 40 C.F.R. § 1502.16. *See also Se. Alaska Conserv. Council v. U.S. Forest Serv.*, 443 F.
5 Supp. 3d 995, 1012–13 (D. Alaska 2020) (noting that unlike an EA, which is meant only
6 to determine *whether* a proposed action will have a significant impact on the environment,
7 “an EIS must compare the environmental impacts of different alternatives, not just
determine whether environmental impacts will occur”).

8 Furthermore, while Reclamation may ultimately determine that an EIS is necessary,
9 the EIS process will be time and resource-intensive. As discussed above, the formal process
10 for the EA (from scoping to FONSI) took approximately one year. Preparing a full EIS will
11 take substantially longer—because the process for preparing an EIS (like its content) is
12 partially defined by regulation. Here, it will involve the following steps. First, before
13 formally commencing the EIS process, Reclamation will enter into a funding agreement
14 with one or both private proponents of the Transfer. Gould Decl. ¶ 6. Then, either
15 Reclamation or those proponents will need to hire a consulting firm to prepare the EIS, and
16 Reclamation will form a multidisciplinary team to plan and oversee the EIS process. *Id.* ¶¶
17 8-9. Reclamation will next publish in the Federal Register a notice of its intent to prepare
18 an EIS, and then undertake a new scoping process (including seeking public comments for
19 at least 30 days). *Id.* ¶ 11; *see also* 40 C.F.R. § 1501.9. After Reclamation considers the
20 information obtained through scoping, a draft EIS will need to be prepared. Next, the draft
21 EIS will need to be published with a minimum 45-day comment period; and then a final
22 EIS will need to be prepared (after Reclamation considers the public comments it received).
23 40 C.F.R. § 1502.9(a)-(c). Reclamation estimates that the process will take a minimum of
24 two years for the formal EIS process (excluding preparation work, like preparing the
25 funding agreement and hiring a contractor, which itself could take over a year)—and the
26 costs associated with the EIS process will be orders of magnitude larger (and much longer)
27 than that for an EA. Gould Decl. ¶¶ 12-16.

28 Ultimately, Reclamation may determine that it should prepare an EIS in light of the

1 Court's MSJ Order. But particularly because Plaintiffs have made no showing that the
2 Transfer itself will have significant impacts to the environment—a supplemental EA could
3 address the specific defects found by the Court and ensure compliance with NEPA.⁵ The
4 Court should therefore remand the Transfer decision to Reclamation for further analysis,
5 consistent with the Court's MSJ Order, in either an EIS or a supplemental EA.⁶

6 **II. Vacatur of the FONSI and Transfer Contracts is Not Appropriate**

7 The Court should not vacate the FONSI and the Transfer Contracts on remand.⁷ The
8 Transfer was ultimately approved and implemented by Reclamation's execution of the four
9 Transfer Contracts, which are necessary for delivery of Arizona fourth priority Colorado
10 River entitlement. An order from the Court vacating the FONSI and Transfer Contracts
11 would leave Reclamation with *no* valid contracts under which it could lawfully deliver the
12 water to Queen Creek or GSC Farm under *Arizona v. California*. Particularly balanced
13 against the relatively minor nature of the EA's defects, the Court should avoid this
14 disruptive result and not vacate the FONSI or the Transfer Contracts.

15 When an agency violates NEPA, “the presumptive remedy is vacatur of the deficient
16 action.” *Solar Energy Indus. Ass'n v. FERC*, 80 F.4th 956, 997 (9th Cir. 2023) (citing *All.*
17 *for Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121 (9th Cir. 2018)).⁸ Nonetheless,

19 ⁵ Plaintiffs' own prayer for relief in its Complaint is consistent with this result: it suggests
20 that an order requiring Reclamation to prepare an adequate EA or an EIS could be
appropriate. ECF No. 1 at 39 (praying that the Court “[o]rder Defendants to comply with
NEPA by preparing an EIS or an adequate EA for the Transfer”).

21 ⁶ Whether Reclamation prepares an EIS or a supplemental EA, Reclamation will continue
22 to bear the burden of ensuring that it is complying with NEPA. And, again in either case,
23 Plaintiffs (and other parties) will retain the option of seeking to challenge Reclamation's
EIS/Record of Decision or supplemental EA/FONSI in Court.

24 ⁷ The United States recognizes that the MSJ Order has already stated that it is “setting
aside” the FONSI. Accordingly, in this brief, the United States asks that the Court issue
25 a new order following the April 14 Status Conference stating that the FONSI is not set
aside pending remand.

26 ⁸ The United States' position is that “set aside” in APA Section 706 does not mean
27 “vacate.” See Br. of Pet'rs, *United States v. Texas*, 599 U.S. 670 (2023) (No. 22-58), 2022
WL 4278395 at *40-44; Reply Br. for Pet'rs, 599 U.S. 670, 2022 WL 17170668 at *16-
28 20. Defendants acknowledge, however, that Circuit precedent controls at this stage.

1 courts should not vacate the action when equitable principles counsel otherwise. *Id.*; *Ctr.*
2 *For Food Safety v. Regan*, 56 F.4th 648, 663 (9th Cir. 2022) (“We leave invalid agency
3 action in place ‘when equity demands’ that we do so”) (quoting *Pollinator Stewardship*
4 *Council v. U.S. EPA*, 806 F.3d 520, 532 (9th Cir. 2015)). When determining whether an
5 agency’s action should remain in effect on remand, the Ninth Circuit has instructed courts
6 to apply a two-factor balancing test, weighing “the seriousness of the agency’s errors
7 against “the disruptive consequences of an interim change that may itself be changed.” *Cal.*
8 *Cmtys. Against Toxics v. U.S. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (quoting *Allied-*
9 *Signal, Inc. v. U.S. Nuclear Regul. Comm’n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993)).

10 A. The Errors in the EA do not Warrant Vacatur

11 Without minimizing the nature of the errors found by the Court, they are not so
12 serious as to warrant vacatur of the FONSI and Transfer Contracts. As discussed above,
13 the Court generally did *not* find the analyses in the EA wanting—and it made no finding
14 questioning Reclamation’s overall determination that the Transfer would *not* significantly
15 impact any of the numerous resources (ranging from threatened species to resources
16 impacted by drought to socioeconomic concerns) evaluated in the EA. Instead, the Court
17 found that Reclamation (1) did not analyze the potential precedential impact of the Transfer
18 with respect to potential *future* transfer requests; and (2) did not adequately analyze the
19 potential for Queen Creek (again, in the *future*) to seek additional surface water to support
20 its planned growth. MSJ Order 16-19.

21 The nature of these errors counsel against vacatur for two reasons. First, the Court
22 determined that Reclamation’s analysis was wanting—not because the analyses
23 Reclamation *did* perform were arbitrary or capricious (particularly with respect to the
24 impacts from the Transfer itself)—but because of analyses that Reclamation *did not*
25 perform (or did not pursue far enough). Such defects are readily curable on remand thereby
26 weighing against vacatur. *See W. Watersheds Project v. Bernhardt*, 543 F. Supp. 3d 958,
27 995 (D. Idaho 2021) (deciding not to vacate lease decision when “the failings of the
28 assembly of the [agency’s] EAs relate, for the most part, to the absence and/or

1 incompleteness of analyses”).

2 Second, Reclamation reasonably could reach the same result after remand. *See*
3 *Pollinator Stewardship Council*, 806 F.3d at 532 (noting that an important consideration is
4 “whether the agency would likely be able to offer better reasoning or whether by complying
5 with procedural rules, it could adopt the same rule on remand, or whether such fundamental
6 flaws in the agency’s decision make it unlikely that the same rule would be adopted on
7 remand”); *Allied-Signal*, 988 F.2d at 151 (declining to vacate because there was “at least
8 a serious possibility that the [agency would] be able to substantiate its decision on
9 remand”); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 83-85 (D.D.C. 2019)
10 (“[N]othing in the record indicates that on remand the agency will necessarily fail to justify
11 its decisions to issue EAs and FONSI,” and therefore remanding “the EAs and FONSI to
12 BLM so that the agency may address the deficiencies identified by the Court above.”)
13 Again—and critically—nothing in the record supports a finding that the Transfer itself is
14 going to cause significant impacts to the environment. Rather, the Court found that
15 Reclamation should have evaluated its import for potential future decisions or actions. As
16 such, there is a “serious possibility” that Reclamation, after undertaking additional NEPA,
17 could conclude that the environmental impacts from the Transfer are not so substantial that
18 the Transfer should be rejected—and that an EIS is not necessary. *See Allied-Signal*, 988
19 F.2d at 151; *Pollinator Stewardship Council*, 806 F.3d at 532. Under these circumstances,
20 the nature of the NEPA defects weigh against vacatur.

21 **B. Vacatur of the FONSI and Transfer Documents would be Disruptive**

22 Moving to the second factor, vacatur of the FONSI and Transfer Contracts would
23 be disruptive. As the Court has recognized, the Transfer Contracts, supported by the
24 FONSI, have been executed, and water has been delivered to Queen Creek. In calendar
25 year 2023, 2,033 AF of water was delivered to Queen Creek. Gould Decl. ¶ 18. Queen
26 Creek has ordered delivery of 2,033 AF in calendar year 2024. *Id.* ¶ 19.

27 If the Transfer Contracts are vacated, Reclamation cannot deliver water to Queen
28 Creek (or to GSC Farms). As noted above, Reclamation can only deliver an Arizona fourth

1 priority Colorado River entitlement, such as that at issue here, if there is a contract between
2 the user and the United States. *Arizona*, 547 U.S. at 156; *see also* 43 U.S.C. § 617d (“No
3 person shall have or be entitled to have the use for any purpose of the water stored as
4 aforesaid except by contract made as herein stated.”). Furthermore, because delivery must
5 be pursuant to a “valid” contract, *Arizona* 547 U.S. at 156, vacatur of the FONSI could
6 give rise to questions as to whether the Transfer Contracts are valid and legally authorize
7 the delivery of water under *Arizona v. California*.

8 The primary disruptive effect of vacating the FONSI and Transfer Contracts will be
9 felt by water users, GSC Farm and Queen Creek.⁹ Queen Creek will be unable to use the
10 water, potentially for years, for its planned purposes, and there undoubtedly are significant
11 financial and operational implications for Queen Creek and GSC Farms under their private
12 contract. *See* MSJ Order 19 (noting \$20 million purchase price paid by Queen Creek); *see*
13 *also* *Cal. Communities Against Toxics*, 688 F.3d at 994 (noting that consequences of

15 ⁹ Plaintiffs sued the government under the Administrative Procedure Act (“APA”) but did
16 not sue GSC Farms and Queens Creek. Relief against non-federal parties exceeds the APA,
17 which authorizes relief only against the government. 5 U.S.C. §§ 702, 706(2). Further,
18 because Queen Creek and GSC Farms were never made parties to the case, there may be
19 some question as to the appropriateness of vacating or rescinding the Transfer Contracts.
20 *See, e.g., United States v. Texas*, 143 S. Ct. 1964, 1980 (2023) (Gorsuch, J., concurring)
21 (federal courts provide “party specific relief” and “[i]f the court’s remedial order affects
22 nonparties, it does so only incidentally”); *Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 395
23 U.S. 100, 110 (1969) (“a court has no power to adjudicate a personal claim or obligation
24 unless it has jurisdiction over the person of the defendant”). This question can arise when
25 contract rights are at issue. *See* *NRDC v. Kempthorne*, 539 F.Supp.2d 1155, 1185 (E.D.
26 Cal. 2008) (noting that “[i]t is well-settled that in an action to set aside a contract, all parties
27 to the contract must be present”) (internal citation omitted). *See also Kettle Range
28 Conservation Grp. v. U.S. BLM*, 150 F.3d 1083, 1087 (9th Cir. 1998) (finding in NEPA
case that the “district court correctly determined that it was without authority to rescind the
contract [for a land exchange] in the absence of joinder of the private parties”); *Pac. Coast
Fed’n of Fishermen’s Assocs. v. U.S. Dep’t of the Interior*, 929 F. Supp. 2d 1039, 1062
(E.D. Cal. 2013) (finding Plaintiffs’ agreement to “limit significantly” the available
remedies by their insistence that they “do not seek to invalidate the interim [water delivery]
contracts” allowed application of the public rights exception to the joinder rules); *Colo.
Env’t Coal. v. Salazar*, 875 F. Supp. 2d 1233, 1259 (D. Colo. 2012) (declining to cancel
oil and gas leases already issued by BLM partially in light of questions whether “the parties
that would be affected by such a decision are properly before the Court”).

1 vacatur “would also be economically disastrous”). Defendants expect that these parties will
2 more fully describe the disruptive consequences of vacatur from their perspective.¹⁰

3 In contrast, Plaintiffs would not suffer any harm if the Court does not vacate the
4 FONSI and Transfer Contracts and water deliveries continue during the remand. The
5 Transfer was implemented in calendar year 2023 and 2,033 AF of water was delivered to
6 Queen Creek—and Defendants are aware of no injury that Plaintiffs suffered as a result.
7 Indeed, as discussed above, the Court expressly found during the Preliminary Injunction
8 proceedings that Plaintiffs had failed to demonstrate any risk of actual harm to themselves
9 if the Transfer were allowed to occur during the pendency of this litigation. *See supra* at 4;
10 PI Order 26-28. There similarly is no reason to expect that Plaintiffs would now suffer
11 harm if the water deliveries to Queen Creek are allowed to continue during remand.¹¹ Nor
12 is vacating the FONSI necessary to protect Plaintiffs: their fundamental interest is in
13 ensuring that Reclamation complies with NEPA with respect to the Transfer. The Court's
14 remand directs Reclamation to do exactly that. Allowing the FONSI to remain in effect
15 until Reclamation issues either (1) a new FONSI based on a supplemental EA, or (2) an
16 EIS addressing the Transfer, will have no impact whatsoever on Plaintiffs' interests.

17 In sum, given the relatively minor and readily correctable nature of Reclamation's
18 errors found by the Court, balanced against the disruptive consequences that would result,
19 the Court should exercise its discretion and not vacate the FONSI and Transfer Contracts.

20 **CONCLUSION**

21 Defendants respectfully request that the Court (1) remand the Transfer to
22 Reclamation to cure the defects found by the Court in an EIS or a supplemental EA; and
23 (2) order that neither the FONSI or the Transfer Contracts are vacated pending the remand.

24

25 ¹⁰ For Reclamation's part, the disruptive effect on its operations would less substantial. If
26 Queen Creek and GSC cannot take delivery of scheduled water, Reclamation could deliver
27 such water to other Arizona water users with a valid contract pursuant to the Arizona
Priority System. *See Gould Decl.* ¶ 21.

28 ¹¹ Similarly, a permanent injunction would not be appropriate for this reason. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 162 (2010).

1
2 Respectfully submitted this 22nd day of March, 2023.

3 TODD KIM
4 Assistant Attorney General

5 /s/ Romney S. Philpott
6 ROMNEY S. PHILPOTT, Senior Attorney
7 U.S. Department of Justice
Environment & Natural Resources Division
Natural Resources Section

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28